

**NORTH DAKOTA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

PROJECT _____

RACE-CONSCIOUS GOAL: The Disadvantaged Business Enterprise (DBE) goal for this project is: ____%

œ **This special provision includes the DBE participation averaging concept. See page XX**
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INTRODUCTION

49 Code of Federal Regulations Part 26 (CFR) states that the contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. Contractors shall carry out applicable requirements of 49 CFR Part 26 in the solicitation, award, and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

In addition, Title VI assures that no person or group of persons may, on the grounds of race, color, national origin, sex, age, or handicap or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any and all programs or activities administered by the Department. For information regarding Title VI, see the **latest** DBE Program.

The two paragraphs above apply to every contractor on the project, including every tier of subcontractor. It is the prime contractor's or subcontractor's responsibility to include the two paragraphs above in every subcontract.

In this special provision:

œ **"Contractor"** means ALL DBE (including MBE and WBE) and non-DBE firms, including prime contractors, **subcontractors**, **suppliers**, brokers, vendors, regular dealers, and manufacturers.

"Prime contractor" means bidders or contractors who are submitting proposals on this project, regardless of the size of the project.

"Quoter" means a DBE and non-DBE subcontractor (under/over \$500,000), supplier, broker, vendor, regular dealer, or manufacturer who submits quotes to another contractor.

"Subcontractor" means a **subcontractor on** any project and who is not a supplier, broker, vendor, regular dealer, or manufacturer.

“Broker” means an agent who negotiates contracts of purchase, work, lease, or sale; or buys and sells goods; or negotiates between buyers and sellers; but without having custody of the property. A broker may assist in the procurement of facilities, materials, or supplies required for the performance of the contract. A broker is not regarded as a supplier, manufacturer, or regular dealer for the purposes of this program.

“Manufacturer” means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

“Regular dealer” means a DBE firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

“Supplier” means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- The firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- “Materials” is defined as steel, petroleum products, concrete, asphalt, and other construction materials. Aggregate is not included in this definition of “materials.” Aggregate providers are considered subcontractors rather than suppliers, regardless of the amount of their quote.

“Race-conscious project” means one that is focused specifically on assisting only DBEs, including women-owned DBEs.

“Race-neutral project” means one that is, or can be used to assist all small businesses. For the purposes of this part, race neutral includes gender-neutrality.

PREBID REQUIREMENTS

IN ORDER FOR THE BIDDER'S PROPOSAL TO BE CONSIDERED RESPONSIVE, ONE OF THE FOLLOWING MUST BE ACHIEVED PRIOR TO THE BID OPENING:

- **THE DBE GOAL LISTED ON PAGE ONE OF THIS SPECIAL PROVISION IS MET.** (Submit the required information on Form A at the time of bid submittal); or
- **THE DBE GOAL IS PARTIALLY MET AND THE BIDDER MEETS THE AVERAGE DBE PARTICIPATION PROPOSED BY ALL BIDDERS ON THIS PROJECT.** (Submit the required information on Form A at the time of bid submittal).

GOOD FAITH EFFORTS

The Department has established the following objective measurement of Good Faith Efforts. Good Faith Efforts will be determined by calculating the average DBE commitments submitted by all bidders on this project and comparing the percent of DBE commitment of each bidder to that percentage average. All bidders participation will be verified by the Civil Rights Office prior to comparisons being made. No bidder will be allowed to adjust their participation once their bid has been submitted.

The following example shows how the Department will compute the average DBE participation:

- 1) Only that amount of a bidder's DBE commitment that does not exceed the established goal will be used.
- 2) The amount of the project goal will be used as the DBE commitment amount from DBE bidders who are bidding as a prime contractor.

Example:

Project DBE Goal is **10%**

DBE commitment is calculated by:

Contractor "A" submits a commitment of 11.8%	=	10.0%
Contractor "B" submits a commitment of 7.0%	=	7.0%
Contractor "C" submits a commitment of 3.6%	=	3.6%
Contractor "D" is a DBE	=	<u>10.0%</u>
Sum of Commitments		30.6%

Average DBE Commitment = 30.6% divided by 4 bidders = 7.65%

Contractors "A", and "D" would all be responsive for meeting the DBE goal.
Contractors "B" and "C" would not be responsive for meeting the average DBE Commitment.

Should the read low bidder's DBE commitment be lower than the average, that bidder will be considered non-responsive to meet the project DBE goal. If that bidder is considered non-responsive due to lack of participation, the next bidder is compared to the average commitment until a bidder is identified as having made the average to achieve the DBE goal.

1. FORM A: MUST BE SUBMITTED AT THE TIME OF BID SUBMITTAL

- A. At the time of bid submittal, all prime contractors must complete Form A and attach it to their bid proposal.
- B. The prime contractors Form A must list all the DBEs intended for use on the project, including DBEs intended to perform work in **all** tiers of subcontracting.

2. FORM B: SUBMIT 10 WORKING DAYS OF BID OPENING

- A. Within 10 working days after the bid opening, **all bidders** must submit Form B or copies of all quotes received to the address in **3c** below. Form B must include **all** tiers of subcontracting for the project.

3. FORM C: SUBMIT WITHIN 10 WORKING DAY AFTER THE BID OPENING

- A. Within 10 working days after notification by the civil rights office, the **low responsive** bidder **must** submit a Form C for each DBE listed on Form A to the address in C. below, unless NDDOT grants a time extension.
- B. No award will be made on a project until Form C's for each DBE are submitted to NDDOT. The contractor and DBE must both sign the form. Form C applies to **all** tiers of subcontractors working with DBE's.
- C. Forms Cs may be faxed to the DBE Liaison Officer, 701-328-1965 or mailed to the Civil Rights Office, NDDOT, 608 East Boulevard Avenue, Bismarck, ND 58505-0700.
- D. Signatures need not be original; faxed signatures are acceptable.
- E. If Form C contains additional pages or an attachment, each page or attachment must be signed by the DBE.

LIST OF DBE PARTICIPATION

Generally, the DBE Participation list is posted to the NDDOT web site:

<http://www.state.nd.us/dot/dbebidinfo.html> two working days after the bid opening. To request a paper copy of the DBE participation web site listing, contact DBE Liaison Officer, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, fax (701) 328-1965, phone (701) 328-2576.

PENALTIES FOR FAILURE TO PROVIDE REQUIRED DOCUMENTATION

Prime contractors and subcontractors are encouraged to discuss the requirements of this special provision with all **businesses** providing quotes on a specific project.

If the low **responsive** bidder, **upon notification by the Department**, fails to submit Form B and C on a project in question, the Department will consider the bid non-responsive.

Prime contractors may be denied future quoting or bidding privileges if they fail to provide copies of all quotes or Form B.

Any bidder may be denied future quoting or bidding privileges for failure to submit Form A and Form C as required.

ADMINISTRATIVE RECONSIDERATION

- 02 If a contractor does not meet the goal or the average DBE participation on the project, the Good Faith Efforts Review Committee will make a preliminary recommendation to not award. The process is:
- A. The contractor is contacted and allowed to comment or make explanations for the record, either in person or through a conference call.
 - B. The contractor is told the Department Director makes the final decision after considering the recommendations of the Good Faith Efforts Review Committee and the Department Deputy Director for Engineering.
 - C. The contractor may choose to visit with the Director and Deputy Director for Engineering, but may not give them any information that has not been given to the Good Faith Efforts Review Committee.
 - D. The Good Faith Efforts Review Committee makes a written recommendation to the Director, which includes comments provided by the contractor. The Committee also gives a copy of the written recommendation to the Deputy Director for Engineering.
 - E. The Deputy Director for Engineering also makes a written recommendation to the Director.
 - F. The Director makes the final written decision.
 - G. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

CONSTRUCTION PROGRESS CHART REQUIREMENT

Before the award of the contract, the apparent low bidder must create a construction progress chart for each DBE to be used on the contract (excluding oil haulers, suppliers, brokers, vendors, regular dealers, or manufacturers). The chart must state the type of work to be performed and when it will be performed.

The apparent low bidder must supply all charts to the Department and the appropriate chart to each DBE to be used on the contract.

PRE-JOB CONFERENCE

It is the prime contractors responsibility to invite all DBEs listed on Form C to the pre-job conference. If the DBE is unable to attend the pre-job conference it is the prime contractors responsibility to provide a copy of the pre-job conference minutes to the DBE. In addition, it is the prime contractors responsibility to discuss any project issues necessary for joint DBE program compliance on the part of the prime contractor, non-DBEs subcontractors and their DBE subcontractors, manufacturers, or regular dealers.

AWARD OF CONTRACT

Contract award will be made to the bidder who submits the lowest responsive proposal meeting the prebid and preaward requirements.

☺ **CONTRACT MONITORING, RESPONSIBILITIES, AND REPORTING**

- ☺ For the life of the project, prime contractors are responsible for the DBEs listed on Form C. It is the
- ☺ prime contractors responsibility to monitor DBE performance on the project, to ensure the DBE
- ☺ performs a commercially useful function and to ensure both the prime contractor and their
- ☺ subcontractors, suppliers, manufacturers, and regular dealers comply with the requirements of this
- ☺ special provision.

- ☺ DBEs are responsible for performing a commercially useful function. Should the DBE be unable to
- ☺ perform a commercially useful function or perform as stated on Form C it is their responsibility to
- ☺ immediately notify the prime contractor orally and in writing.

The prime contractor must submit a completed copy of the DBE Participation Certification (SFN 14268), signed by the prime contractor and the DBE, to the project engineer upon completion of the contract to verify DBE participation. This includes DBE's used that were not included on Form A. The project will be monitored to ensure the DBE is performing a commercially useful function. See pages 11 and 12 of this special provision for information regarding commercially useful function.

MAINTAINING RECORDS & TRACKING PAYMENTS

The Department will require prime contractors and subcontractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection, upon request, by any authorized representative of the NDDOT or USDOT. This reporting requirement also applies to any certified DBE.

Prime contractors and subcontractors must keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract. Prime contractors and subcontractors will be required to give NDDOT a record of payment by the tenth working day after the October-December quarter, the tenth working day after the January-March quarter, the tenth working day after the April-June quarter, and the tenth working day after the months of July, August, and September. The record must contain the name of the prime contractor or subcontractor, the project number, and the amount paid to the DBE for the reporting period only. Send the record to the DBE Liaison Officer, North Dakota Department of Transportation, 608 E. Boulevard Ave., Bismarck, ND 58505-0700.

NDDOT may perform interim audits of contract payments to DBEs to ensure that the actual amount paid to DBEs equals or exceeds the dollar amount stated on Form C.

NONFULFILLED OBLIGATIONS

The Department uses the following process when a contractor or DBE does not fulfill all of his or her obligations:

1. Nonfulfilled obligations by a contractor

- ☺ A. If the Department determines that a contractor should be sanctioned for not paying a DBE in a timely manner, not having a DBE perform the specified dollar amount of work (subject

to plan quantity changes) or the tasks listed on Form C, or for otherwise not fulfilling the requirements of this DBE special provision, the Department will provide written notice to the contractor informing them of the sanction.

- B. The contractor has 14 calendar days from receipt of the certified notification to make a written request for a hearing.
- C. If the Department does not receive a written request, or if the contractor does not provide sufficient evidence at the hearing that the provisions have been met, the Department may:
 - 1. Withhold the contractor's progress payment until the contractor complies with all DBE contract provisions
 - 2. Deduct, from the contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the contractor
 - 3. Find the contractor in default
 - 4. Disallow the contractor from bidding in one or more scheduled bid openings after the date the sanction is imposed
 - 5. Take other corrective action determined by the Department to be appropriate, or
 - 6. Any combination of the above.
- D. Grounds for sanctions may include, but are not limited to: instances of nonfulfillment of contract, instances of late contract-related payments, or documented fraudulent practices.

2. Nonfulfilled obligations by a DBE

- A. If a DBE fails to fulfill all contract obligations to the contractor or to pay contract-related bills in a timely manner, the prime contractor is required to do the following:
 - 1. Immediately give oral and written notice to the project engineer of the DBE's nonfulfillment of commitments, stating the nature of the nonfulfillment.
 - 2. Provide written documentation to the project engineer that the DBE is unable or unwilling to perform the contract. Documentation may consist of a signed statement by the DBE that it is unable or unwilling to perform the contract. If the prime contractor cannot obtain such a document, the prime contractor must submit other documentation of contract nonfulfillment by the DBE.
 - 3. Immediately give oral and written notice to the DBE, stating the nature of the failure.
- A. If the Department concurs that the DBE is unable or unwilling to perform, the contractor will seek, through the DBE Liaison Officer or the Supportive Services Contractor, another DBE to complete the work. If another DBE is not available for work within (5) working days after the contractor informs the Department that the DBE is unable or unwilling to perform, or if the controlling items of work being performed by the contractor will be delayed because the DBE is unable or unwilling to perform, the contractor may complete the work. The prime contractor is responsible for any additional costs incurred as a result of any DBE's failure to perform.
- B. If the Department determines that the DBE should be sanctioned for nonfulfillment of a contract, for failure to pay contract-related bills in a timely manner, for failing to perform a

commercially useful function, for failure to notify the prime contractor orally and in writing if they are unable to perform a commercially useful function, or for otherwise not fulfilling the requirements of this DBE special provision the Department will provide written notice to the DBE, informing the DBE of the sanction.

1. The DBE has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing.
2. If the Department does not receive a written request for a hearing, or if the DBE does not provide sufficient evidence at the hearing that the provisions have been met, the Department may suspend the DBE and not allow the DBE to participate in one or more scheduled bid openings after the date the sanction is imposed.
3. Grounds for sanctions may include, but are not limited to: instances of nonfulfillment of contract, instances of late contract-related payments, or documented fraudulent practices.

MONITORING AND ENFORCEMENT MECHANISMS

The Department will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, or referral to the USDOT Inspector General for action under Suspension and Debarment or Program Fraud and Civil Remedies rules) provided in §26.107. The Department will also consider similar action under its own legal authorities, including responsibility determinations in future contracts.

COUNTING DBE PARTICIPATION

This segment is provided in this special provision to help contractors and DBEs determine the dollar value of the work DBEs will actually be performing, as required in this special provision. The federal regulations on counting DBE participation toward the Department's annual goal, as provided in 49 CFR Part 26.55, is as follows:

1. When a DBE participates in a contract, the Department counts only the value of the work actually performed by the DBE toward DBE goals.
 - A. The Department counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph 1B of this section) that is performed by the DBE's own forces. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - B. The Department counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, if the Department determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - C. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is also a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE

goals.

2. When a DBE performs as a participant in a joint venture, the Department counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
3. The Department counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
 - A. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Department must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
 - B. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Department must examine similar transactions, particularly those in which DBEs do not participate.
 - C. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Department must presume that it is not performing a commercially useful function.
 - D. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 3C of this section, the DBE may present evidence to rebut this presumption. The Department may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - E. The Department's decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.
4. The Department will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
 - A. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - B. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - C. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

- D. The DBE may lease trucks from another DBE firm, including an owner-operator certified as a DBE. The DBE leasing trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - E. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
 - F. For purposes of this paragraph (4), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
5. The Department counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- A. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals.
 - 1. For purposes of this paragraph (5A), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 - B. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
 - 1. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
 - a. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
 - b. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (5B[1]) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - c. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (5B).
 - C. With respect to materials or supplies purchased from a DBE which is neither a

manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, if the Department determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

6. If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, the Department does not count the firm's participation toward any DBE goals, except as provided for in §26.87(i).
7. The Department does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Department's overall annual goal.
8. The Department does not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the Department's overall annual goal until the amount being counted toward the goal has been paid to the DBE.

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FORM C